LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAY 29 1958
JOHN T. FEY, Clerk

No. 977

# In the Supreme Court of the United States

OCTOBER TERM, 1957

ALFRED K. STERN AND MARTHA DODD STERN,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
*Solicitor General,*
J. WALTER YEAGLEY,
*Acting Assistant Attorney General,*
PHILIP R. MONAHAN,
CARL G. COBEN,
*Attorneys,*
*Department of Justice, Washington 25, D. C.*

# INDEX

## CITATIONS


Cases:
*Blackmer* v. *United States*, 284 U. S. 421 ----------
*Eisler* v. *United States*, 339 U. S. 189, 883 ----------
*National Union* v. *Arnold*, 348 U. S. 37 ----------
*United States* v. *United Mine Workers*, 330 U. S. 258 --
Statutes and Rules:
18 U. S. C. 371 ----------
28 U. S. C. 1783 ---------- 3, 4, 8,
28 U. S. C. 1784 ----------
Federal Rules of Civil Procedure:
Rule 81 (a) (3) ----------
Federal Rules of Criminal Procedure:
Rule 38 (a) (3) ---------- 5, 9,
Rule 42 ----------
Rule 54 (b) (5) ----------
Rules of the Supreme Court, Rule 22 (2) ----------

further demonstrate that such is its underlying objective.

The Court of Appeals' order of December 5, 1957, *supra*, directing the dismissal of petitioners' appeals unless petitioners, within 60 days, deposited the amount of their fines in the registry of the District Court or gave bond for the payment thereof, was nothing more than a concrete application of Rule 38 (a) (3) to the facts and circumstances presented by this record.[7] Here, it was obviously too late to "re-

[7] Rule 54 (b) (5) provides that "[t]hese rules," i. e., the Federal Rules of Criminal Procedure, "do not apply to," *inter alia*, "proceedings against a witness in a foreign country under Title 28, U. S. C., 1784." The latter section (see fn. 3, *supra*, p. 3) contains the "contempt" provisions applicable to a refusal to obey a subpoena issued by a court of the United States which has been personally served in a foreign country on a citizen or resident of the United States. Petitioners argued in the Court of Appeals (see R. 40) that, by virtue of Rule 54 (b) (5), Rule 38 (a) (3) has no applicability to a fine imposed under 28 U. S. C. 1784. The argument—which is not renewed in this Court—is in any event clearly unsound. The evident meaning of the provision, *supra*, of Rule 54 (b) (5)—to the effect that the Federal Rules of Criminal Procedure "do not apply to" "*proceedings* against a witness in a foreign country under Title 28, U. S. C., 1784" (emphasis supplied)—is that the procedure for punishing contempts consisting of refusals to obey subpoenas served in a foreign country is as set forth in that Code section, rather than as provided in the "Criminal Contempt" provisions (i. e., Rule 42) of the Federal Rules of Criminal Procedure. Rule 38 (a) (3)—authorizing the requiring of the deposit of the amount of a fine in the registry of the district court pending appeal therefrom—is, on the other hand (like the rest of Rule 38), a rule of general applicability: that is, it applies to *any* fine. Consequently, the fact that the fines here in issue happened to arise out of proceedings for criminal contempt under 28 U. S. C. 1784 is an irrelevancy so far as the applicability of Rule 38 (a) (3) to those fines is concerned. Accordingly, Rule 54 (b) (5) is likewise irrelevant.

strain the defendant[s] from dissipating [their] assets," since this result (so far as the possibility of levying on the assets for the purpose of applying them or their proceeds towards the payment of the fines in issue was concerned) had already been accomplished by petitioners. The Court of Appeals' only recourse was thus to condition its consideration of the appeals on petitioners' depositing the amounts of their fines in the registry of the District Court, or giving bond for their payment, within a reasonable time to be fixed by an order. This is precisely what the Court of Appeals did. The sixty-day period fixed by the court's order was clearly reasonable, and petitioners do not suggest otherwise. When petitioners failed to meet this reasonable condition, they evidenced a basic absence of good faith in the prosecution of their appeals; that is to say, they evidenced an intent not to pay their fines regardless of the outcome of their appeals. They ought, in other words, to insure themselves against ultimate loss irrespective of what substantive disposition the Court of Appeals might make of their appeals. The Federal Rules of Criminal Procedure give no defendant this option. The dismissal of petitioners' appeals was accordingly proper. Cf. *Eisler* v. *United States*, 338 U. S. 189, 883, and *National Union* v. *Arnold*, 348 U. S. 37.

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*
J. WALTER YEAGLEY,
*Acting Assistant Attorney General.*
PHILIP R. MONAHAN,
CARL G. COBEN,
*Attorneys.*

JUNE 1958.

It is true that an order of Mr. Justice Harlan, entered February 28, 1958, provided for an extension of petitioners' time for filing to May 5, 1958, but the order was entered pursuant to the representation of counsel that "[t]his is a civil appeal."* Such a characterization of the case, in our view, is patently erroneous. Petitioners were found guilty of criminal—not civil—contempt. The fines imposed were unconditional, and the purpose of the proceedings was to punish petitioners for their disobedience of judicially issued subpoenas. See R. 3, 11, 18, 19, 22–23, 27–28, Pet. App. 29, 30; and cf. 28 U. S. C. 1784 (a) and (d)

---

*Counsel's application stated (p. 5): "This is a civil appeal, within the meaning of Rule 81 (a) (3), F. R. C. P., which ordinarily would start the tolling of petitioners' time to file for a writ of certiorari as of February 5, 1958, and give them until May 5, 1958 to make such filing. However, it may possibly be argued that the ninety days period commenced on December 5, 1957 [the date of the Court of Appeals' order of conditional dismissal of the appeals—see *supra*, pp. 6–7], in which case it would expire March 5, 1958."

Petitioners' suggestion that under Rule 81 (a) (3) of the Federal Rules of Civil Procedure an appeal from a judgment of contempt under 28 U. S. C. 1784 is an appeal in a civil proceeding is based, we think it clear, on a misreading of that rule. In pertinent part, it provides: "* * * These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings." Here, however, not only were the subpoenas judicial in nature (as distinguished from administrative, see Advisory Committee's Note), but, what is more important, the appeal involved was from a final judgment of contempt, calculated to *punish* petitioners for their completed acts of disobedience. See also text immediately following.

(set forth in fn. 3, *supra*, p. 3), which is the statutory basis on which petitioners were "adjudge[d] * * * guilty of" and "punished for" their contempts. An unconditional fine and a purpose to punish are the typical indicia of a criminal contempt judgment. *United States* v. *United Mine Workers*, 330 U. S. 258, 302–305. And see *Blackmer* v. *United States*, 284 U. S. 421, 440 (involving the same type of proceeding and the same statute as are involved here), expressly recognizing that "the offense is a criminal one."

It follows, therefore, that the petition is out-of-time.

2. In any event, it is submitted that the judgment below is clearly correct, and that the petition for certiorari presents no question meriting review by this Court. Rule 38 (a) (3) of the Federal Rules of Criminal Procedure (set forth in fn. 4, *supra*, p. 5) authorizes a district court or court of appeals, in any criminal proceeding in which the defendant has been sentenced to pay a fine which the defendant elects to challenge on appeal, to "require the defendant pending appeal to deposit the whole or any part of the fine" in the registry of the court or "to give bond for the payment thereof." The evident purpose of the rule is to ensure that the fine, in the event the appeal should fail, will be paid—that, in other words, the defendant will abide the result of his appeal should it be adverse. The rule's concluding provisions, giving the court the power to require the defendant pending appeal to "submit to an examination of assets" and to make "any appropriate order to restrain the defendant from dissipating his assets,"